SUPREME COURT, U. S.
No. 74-1170
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MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THOMAS MARTIN AUSTIN, KENNETH PAUL ALBANESE, JAMES THOMAS BEZOUSEK, JAMES RALPH BLUMER, ARTHUR MARC CAMPUS, THOMAS JOHN COLLURA, ALAN STEPHEN DORN, MICHAEL DAVID FRAZIER, BARRY LAWRENCE FRIEDMAN, MAURICE A. HENRY, ALVIN MARRIS HIGGS, DAVID ARTHUR LIDOV, EDWARD JAMES LUERSSEN, ALBERT ANTONIO MARTINEZ, LESTER PATRICK NOLAN, PAUL PARKER, ROBERT RICHARD PEREZ, MICHAEL DAVID POWERS, MICHAEL ROSENBAUM, SIDNEY E. SALZMANN, CHARLES FENN SLEETH, and RONALD EDWARD TERRITO, Real Parties in Interest,

Petitioners,

—v.—

UNITED STATES OF AMERICA and HON. JACK B. WEINSTEIN, District Judge.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The undersigned attorney, on behalf of the above-named real parties in interest, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is not yet reported. The district court's opinion of September 30, 1974 (App. C), is reported at 382 F. Supp. 1111. The other opinions of the district court (Apps. B, D, and E, infra) are not yet reported.

JURISDICTION

On January 30, 1975, the Court of Appeals granted the government's petition for a writ of mandamus and prohibition, (1) requiring the district judge to vacate his orders opening the Selective Service files of each of the petitioners for inspection by their court-appointed attorney and an amicus curiae, and (2) forbidding the district judge to entertain motions on behalf of any of the petitioners(non-appearing defendants charged with draft violations) raising "non-jurisdictional" defenses to the indictments against them, unless the respective defendant had personally authorized the making of such a motion on his behalf. The judgment of the court of appeals is set forth in App. F infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is the judiciary powerless to inquire (without the United States Attorney's consent) into the validity of the more than four thousand pending draft violation indictments of persons who have not submitted to prosecution, so that the executive branch retains a jurisdictional monopoly over the treatment of such persons?

2. Does a district court have power to inquire into the validity of the indictment of a non-appearing defendant who has not retained counsel or personally requested appointment of counsel?

3. Does a district court have power to appoint counsel for such a defendant in order to permit adjudication, in an adversary context, of questions whether the indictment is invalid because (a) it has been unconstitutionally used as an instrument of exile, and/or (b) it is predicated upon alleged failure to comply with an unauthorized and therefore unlawful draft board order?

4. Does a district court have power to direct the government to open the Selective Service file of such a defendant without personal authorization by him, for inspection by an attorney appointed to represent him in testing the validity of his indictment?

5. Does a court of appeals have power to adjudicate the government's

petition for interlocutory review of district court orders which, whether or not erroneous, can only affect the government's legitimate interests if they lead to dismissal of an indictment (from which dismissal the government can appeal)?

6. Has the controversy been rendered partly moot by the recent amendments to the Freedom of Information Act, which became effective after entry of the court of appeals judgment?

STATEMENT

On September 10, 1974, the respondent Jack B. Weinstein, United States District Judge for the Eastern District of New York, on his own motion appointed Louis Lusky (a member of the bar and a professor at Columbia Law School) to represent, as their attorney, the defendants in all of the draft violation cases on his calendar in which the defendants had not appeared. There were 26 such cases. Of the 26 defendants, only 22 are involved as real parties in interest in the present case; the indictments against three of the other four defendants (Howard G. Lockwood, Donald Charles Dewey, and Franklin Wilson) were dismissed for various reasons on the government's motion, and in the fourth case (United States v. Estremera) the defendant's attorney in an unrelated case has been substituted for Louis Lusky as attorney for Mr. Estremera in the draft violation case as well and that defendant(having personally authorized such substitution) is unaffected by the court of appeals decision herein.

Also on September 10, 1974, Judge Weinstein rendered a memorandum opinion (App. B) saying briefly why he considered appointment of counsel to be appropriate:

> The court takes judicial notice of the fact that the President and Congress are considering some form of amnesty that may affect the rights of these defendants and thousands of others who are similarly situated.

It will be helpful to recall the context. Two days before, on September 8, President Ford had pardoned his immediate predecessor of any and all crimes he may have committed during his presidency. The seeming inconsistency between that pardon and the continued prosecution or punishment of war resisters (as well as other aspects of the pardon) had sparked large public discussion. It was, in fact, on September 16 -- six days after the September 10 appointment of counsel -- that President Ford, by executive order (Ex. 2 for identification in the proceedings below), instituted his conditional amnesty program under which alleged draft violators could obtain dismissal of their indictments by performance of prescribed civilian service for a period of not more than two years.

Against that factual background, the United States Attorney moved to vacate

the September 10 appointment of counsel, and a hearing was had on September 20. The motion was denied. In order to expedite such appellate review as the government might wish to seek, Judge Weinstein -- without expressing any opinion as to the availability of interlocutory appellate review -- hastened to issue a memorandum opinion that same day, explaining in greater detail the reasons for appointment of counsel. At the hearing he had told counsel why he intended to render an opinion that same afternoon, and had said it would be subject to revision (9/20/74 Tr. p. 64). He did revise it promptly thereafter, rendering the revised opinion (App. C) on September 30.

In that opinion Judge Weinstein stated at greater length his reasons for the appointment of counsel (App. C, pp. 2-4). After reviewing the government's conditional amnesty program, he commented upon it (id. at 3-4):

> In effect, a pretrial diversion or deferred prosecution scheme is to be applied in these cases. * * * It is sometimes called the "Brooklyn Plan," for one form was developed in this court. Before or after indictment, but without trial or plea, the defendant is placed under supervision. If he responds favorably over a fixed period of time -- usually one or two

years -- he is not indicted or, if he had been indicted, the indictment was dismissed.

The saving in time and money and the enhancement of the likelihood of rehabilitation make diversion programs attractive. But they present grave dangers unless they are strictly controlled. A guiltless person may be forced to undergo strict supervision and loss of liberty because he wants to avoid the expense and embarrassment of contesting the government's case. * * *

Some method must be utilized to prevent abuse of plans which divert cases from the normal criminal machinery to ensure that individual rights are being safeguarded. The agency with primary responsibility to prevent prosecutorial abuse after indictment is the court.

While an indictment against a defendant remains outstanding, the pressure on him to agree to perform "alternate service" is great even though the indictment may be invalid and there is no warrant in law for his being denominated a draft evader. * * *

Both from the point of view of effective calendar control and protection of the rights of those accused of

> draft evasion, it is desirable to screen these selective service cases to determine if they have any merit.

The government elected not to seek appellate review at that time, and further proceedings were had in the district court. Defense counsel's motion to dismiss on constitutional grounds (briefly summarized below) was argued on November 1. After hearing argument, Judge Weinstein reserved judgment on the motion pending receipt of a brief from the government. He also stated on the record that the government should make the Selective Service files available for examination by defense counsel, but stayed the informal order pending receipt of the government's brief.

On November 21, 1974, having received and considered that brief, Judge Weinstein vacated the stay and entered an order making it possible for the government to provide copies of the Selective Service files without cost to the United States Attorney's office (that official having objected to the imposition of such expense). In his memorandum and order (App. D, pp. 1-2) Judge Weinstein said:

> Rather than further embarrass the United States on this matter, the court directs that the files be made available by delivering them, or a copy, to this court in chambers within five days. This court will then have its own personnel produce a copy for counsel for the defendants and one for the amicus curiae. Counsel for the

> defendants and the amicus curiae will hold the copies for the defendants.

The amicus curiae was Michael E. Tigar, Esq., of the Washington, D.C. law firm of Williams, Connolly & Califano, who (by reason of interest arising from his representation of defendants in other pending draft violation cases) had been permitted to file briefs and participate in oral argument at the September 20 and November 1 hearings.

On November 26, 1974, Judge Weinstein denied the motion to dismiss, without prejudice to its renewal after defense counsel had examined the Selective Service files of the several defendants. In his memorandum opinion (App. E) he gave several reasons for this course, saying among other things (id., p.13):

> [W]hen an important constitutional issue is raised which may require Appellate and Supreme Court adjudications, it is particularly appropriate to develop individual records for the benefit of the reviewing court.

The government then stated its intention to seek appellate review, and Judge Weinstein granted a stay to permit preparation of the necessary papers. In due course the government petitioned the Second Circuit Court of Appeals for mandamus and prohibition. Argument was heard on

January 6, 1975. On January 30, 1975, the court of appeals rendered its opinion (App. A) and entered its judgment (App. F) granting the relief described above under the heading "Jurisdiction."

Judge Weinstein notified the court of appeals on December 10, 1975, that he had no intention of filing an answer or appearing, and he took no part in the court of appeals proceeding. On the assumption that he will adhere to that neutral posture, he is here named as a party respondent. The petitioners herein are the defendants in the several district court cases affected by the decision of the court of appeals, who as real parties in interest were parties to the court of appeals proceeding (Fed. Rules App. Proc. 21(b)), and under this Court's Rule 21(4) have standing to petition for certiorari. As required by the said Rule 21(4), the undersigned counsel for petitioners (a) has notified the Clerk of this Court that (for the reason stated above) Raul Estremera has no interest in the outcome of the present petition, and (b) has served a copy of that notice on all parties to the proceeding below including the said Raul Estremera.

REASONS FOR GRANTING THE WRIT

I. Not only does this case involve an important question of federal law which has not been, but should be, settled by this Court. It also presents a controversy as to whether at least one other such question, of the very first magnitude, can be forever withheld from adjudication here.

The backdrop for the present litigation is the war in southeast Asia, which has been the

longest in our history and the most divisive since the Civil War. Many of our most public-spirited, selfless, and intelligent young citizens, deeply doubtful that this military venture (the necessity of which has never been made clear to the American people by any administration, Democrat or Republican) was a just war, were reluctant to participate in it. Some of them sought and were granted exemption from military conscription as conscientious objectors. Some were denied such exemptions -- erroneously, in a number of cases, as this Court has since held (see, e.g., Welsh v. United States, 398 U.S. 333 (1970)) -- but nevertheless submitted to induction into the armed services. Others did not respond to induction orders and were accordingly indicted for violation of the Selective Service Law and regulations. Of these, some submitted to prosecution; but more than four thousand did not. (According to official statistics, the count as of August 31, 1974, was 4,177, consisting of 4,146 indictments and 31 informations.) It is this last group that the present case concerns. The 22 petitioners were indicted in the Eastern District of New York during the period 1968-1973, and have not surrendered or been arrested. So far as is known, all of them are in foreign countries.

The court of appeals, in its opinion, repeatedly referred to them as "fugitives" (see, e.g., App. A, pp. 8, 9, 10, 11, 12, 13), and it declared that prosecution had been frustrated by their "flight from the jurisdiction." (id., p. 12). The record contains no basis for characterizing them as fugitives; indeed, as the court of appeals was informed, there is good reason to believe that at least some of them did not leave this country to avoid prosecution:

At the oral argument, defense counsel emphasized that the effect of granting the government's petition would be to prevent the district court from ascertaining whether they were fugitives or not; and, to illustrate the point, he made avowal that the defendant Richard E. Salzmann had no reason to anticipate being drafted because he had a deferment as a rabbinical student, with the sure prospect of receiving a ministerial exemption upon graduation, and for religious reasons had gone to Israel a month before graduation without realizing that this would precipitate an induction order. He later served in the Israeli army. He cannot rightly be called a fugitive, nor can it rightly be said that his prosecution has been frustrated by his "flight from the jurisdiction." The same is true of at least some of the other defendants, such as Thomas J. Collura who went to Italy in 1965 to finish his education, including a doctorate in chemical engineering, and did not return in 1971 when he was ordered to report for induction, or in 1972 when he was indicted. The fact is that the court of appeals, by prohibiting the district court from opening the Selective Service files for examination, has foreclosed resort to the most direct means of finding out which of the defendants, if any, actually <u>is</u> a "fugitive" who has frustrated prosecution by "flight from the jurisdiction."

In questioning the terminology employed by the court of appeals, we do not intend to suggest that

the defendants necessarily have a defense to the charges against them. That is a separate question. We do say that that separate question can be approached most dispassionately and evenhandedly if the defendants' names are not first blackened gratuitously by opprobrious epithets.

The precise question now before this Court is whether a court of appeals can rightly prevent a district court from inquiring sua sponte into the validity of draft violation indictments which, though fair on their face, may be subject to dismissal on motion. That question should have been decided (a) in the light of judicially noticeable facts concerning draft violation prosecutions, and (b) in the light of the substantiality of the objections to which the indictments may be vulnerable. Instead, the court of appeals ignored both; it adopted a flat, self-blinding rule that -- except with the United States Attorney's consent -- the district court can dismiss invalid indictments only on motion of an attorney whom the defendant has personally authorized to seek dismissal. We now discuss briefly the two above considerations, which the district court took into account but which the court of appeals, in effect, held immaterial.

Facts concerning draft violation prosecutions: Two simple and judicially noticeable facts are sufficient to disclose a possibility of injustice worthy of judicial concern:

(1) On September 16, 1974, President Ford by proclamation instituted a conditional amnesty

program under which alleged draft violators could have their indictments dismissed if they surrendered to the United States Attorney and performed civilian service approved by the government for a period of not more than two years. As Judge Weinstein observed, such a program gives rise to the danger that a guiltless defendant(for example, one whose induction order was invalid under the rule of Gutknecht v. United States, 396 U.S. 295 (1970) or the rule of Welsh v. United States, 398 U.S. 333 (1970) and whose indictment was therefore dismissible) might be constrained to accept the burden of alternative service because of his fear of the vicissitudes of a jury trial.

(2) The indictments in these cases are by no means "mere statistics" as the court of appeals declared them to be (App. A, p. 12). We submit that the district judge was plainly right in the position he took on precisely this point at the hearing of September 20, 1974. In response to the assertion of the Assistant United States Attorney that a dormant indictment "is basically, simply a statistic", Judge Weinstein responded (9/20/74 Tr. pp. 11-12):

> No, it is not simply a statistic. On that I disagree with you and I think that is fundamental to an understanding of these things. These are not statistics. They involve real people and they involve the protection of the public and under the individual calendar system in this court, the Court, as I understand it, has the obligation to make sure these cases are not forgotten.

> There have been cases in the past, fugitive cases, that I have called where it appeared to me that the assistant in charge of the case had forgotten the case and as I recall, in one instance, the defendant fugitive was actually incarcerated.
>
> Now, these are not statistics. These are real cases * * *.

Later in the same hearing, defense counsel developed Judge Weinstein's line of thought further (id., p. 27):

> Some of the Selective Service violators have felt that their consciences and their country could best be served by standing trial* and taking the legal consequences of their actions. Others have thought that they could serve their consciences and their country better by avoiding prosecution and in order to do that they have either had to leave the country or go underground and hide in this country. I say that the pendency of these indictments on this Court's record is a fact which is tantamount to an order of exile for defendants in the latter class [,] and this has nothing to do with whether the indictments are legal or not. It is

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* As originally rendered, the transcript read "standing proud". This stenographic error was later corrected by stipulation.

just a question of whether they are simply statistics as Mr. Korman said, or whether they are real, live [,] operative legal instruments.

Substantiality of objections to the indictments: The objections that we shall address to the indictments, unless prevented by the judgment of the court of appeals, fall into two categories. The first is abuse of criminal process. The second is possible invalidity of draft board orders which the defendants are accused of disobeying. The nature of the latter type of objection is self-evident, as is the fact that such objections cannot be framed without access to the Selective Service files. The nature of the former objection, however, requires a brief explanation.

It is familiar doctrine that criminal process is not to be used for purposes collateral to the prosecution and lawful punishment of crime. For example, it is not to be used to coerce payment of a debt, or to obtain the secret discovery of facts for use in civil litigation. See, e.g., Procter & Gamble v. United States, 356 U.S. 677, 683 (1958). We contended in the district court that the present indictments have been so abused, in that they have been employed as instruments of exile; and that court, while conceding that the point (not yet passed upon by this Court) may have merit (App. E, pp. 8-12) denied a motion to dismiss, with leave to renew the motion after a more complete factual record, which Judge Weinstein said would be more suitable for appellate review, had been made on the basis

of the Selective Service files (id., p. 13). The court of appeals, however, shrugged off the objection as frivolous (App. A, p. 8).

The objection is far from frivolous. To show that it merits the careful attention of the lower federal courts, and ultimately of this Court, we shall sketch it out. If the Court so desires, we shall be glad to brief it fully; but inasmuch as we do not think the Court will consider the question of abuse of criminal process to be ripe for decision until the lower courts have deliberated upon it, we state only enough to rebut any suggestion of frivolity.

In this connection, this Court should be advised that the summary rejection of the speedy trial contention by the court of appeals cannot be assumed to reflect full deliberation on its part. In our brief in that court we said, as we have said here, that we did not purport to brief the point fully but would go into it only far enough to show that it raises a non-frivolous question of first impression. We added, however (Response to Petition, p. 21):

> To any member of this Court who desires full explication of the factual and legal basis of our speedy trial claim, we shall be prepared at the oral argument to hand up copies of our two briefs supporting the motion to dismiss.

The briefs were tendered at the oral argument as promised, but no member of the panel asked for them, and none were filed. The point was hardly touched on in the oral argument itself.

Under these circumstances it is not to be supposed that the court of appeals has fully informed itself on the question and extended to it the deliberate consideration which it customarily accords.

A simple way to sketch the point is to hypothesize a case: If the President were to announce publicly (a) that persons indicted for draft violation could elect between surrendering for trial and leaving the country forever, and (b) that in the latter event no effort would be made to procure their return for trial, we submit that this Court would condemn such a program of exile as an abuse of criminal process. At least two lines of constitutional doctrine converge to forbid it: (1) Exile for draft evasion is a penalty not authorized by law, and constitutes a cruel and unusual punishment in violation of the Eighth Amendment under the principle established in Trop v. Dulles, 356 U.S. 86 (1958) as well as punishment without the safeguards of the Fifth and Sixth Amendments in violation of the principle established in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). (2) The Speedy Trial Clause of the Sixth Amendment imposes an obligation on the government to do what it can to procure the return for trial of defendants who, even though they are beyond its territorial jurisdiction so that it has no legal right to their return, may in fact be sent back by another state pursuant to a request based on comity. This Court so held in Smith v. Hooey, 393 U.S. 374 (1969) and Dickey v. Florida, 398 U.S. 30 (1970). Moreover, this Court has also held that although a defendant's lack of desire for a speedy trial is a factor militating against his claim of the Sixth Amendment right, it is not conclusive because "there is a societal interest in providing a speedy

trial which exists separate from and at times in opposition to the interests of the accused." Barker v. Wingo, 407 U.S. 514, 519(1972). The important question as to how the speedy trial rule of that case, which requires the balancing of four separate factors, is to be applied in the context of draft violation prosecutions, has not been settled by this Court but eventually should be. For a reason to be stated in a moment, the decision of the Court of Appeals, if allowed to stand, will very probably preclude such a determination.

First, however, it is to be observed that the executive branch of the government has in fact pursued a policy of giving alleged draft violators a free choice between trial and exile for life, and of making no attempt to procure their return from abroad. So far as we have been able to ascertain, it has never in the last half-century requested a foreign government, on the basis of comity, to extradite, deport, or exclude such a defendant from its territory. See Gosfield, American War Resisters, 5 N.Y.U. J. Int'l L. & Pol. 503, 522 (1972). On occasion it explains this omission on the ground that national policy forbids such a request except pursuant to an extradition treaty applicable to the offense, which our present extradition treaties are not. See Evans, Acquisition of Custody over the International Fugitive Offender -- Alternatives to Extradition: A Survey of United States Practice, in The British Year Book of International Law (1964), p. 77, at p. 79. It is known, however, that this supposed policy is not adhered to in the ordinary run of criminal cases, such as narcotics cases. The Second Circuit Court of Appeals knows it well, having recently adjudicated just such a case. Fiocconi v. Attorney General of the United States, 462 F. 2d 475 (2d Cir. 1972). When in pursuit of common

criminals, the executive branch avails itself of all the resources available to it by the comity of nations to procure their return for trial. As for defendants charged with offenses thought (however wrongly) to reflect lack of allegiance, it is content with exile and does not pursue them. That is the same policy which this Court held in Trop v. Dulles and Kennedy v. Mendoza-Martinez, supra, to be unconstitutional. And though the policy has not been formally promulgated, the executive branch has allowed it to become generally known and understood.

As stated above, we do not ask this Court now to decide the question whether there has been an abuse of criminal process that should lead to dismissal of these indictments and more than four thousand others. The Court is entitled to the benefit of preliminary consideration of the question by lower federal courts. Our points are, rather, (1) that the question is of first-magnitude importance, not only because it involves the future of a great many young Americans whom this country needs, but also because it presents the opportunity to clear from the dockets of the federal courts more than four thousand indictments that have gone stale, in the sense that no such indictments would be returned today; (2) that the question is a substantial one, left open by this Court's prior rulings and not to be shrugged off as frivolous, because it rests on a claim of fault on the government's part that is anterior to and more fundamental than any fault of the defendants in absenting themselves; and (3) that the court of appeals decision, unless reversed, may well prevent it from ever being adjudicated here.

In connection with this third point, a word of explanation is appropriate. It is true that

the court of appeals has (somewhat inconsistently) permitted the district court to entertain motions to dismiss on behalf of defendants who, though still in exile, personally authorize such action by their court-appointed attorney. Four of the 22 petitioners, having learned of the present proceeding, have mailed in such personal authorizations, and a few more may do so. So far as can be known, however, most of them have not received the notices of appointment of counsel which the United States Attorney, at Judge Weinstein's direction, mailed to them at their last-known addresses; at any rate, nothing has been heard from them. Motions to dismiss will of course be made on behalf of the four who have sent personal authorizations (after the government produces their Selective Service files for inspection, which it has not yet done though requested); but these few cases may well go off on non-constitutional grounds such as departure from the Gutknecht and Welsh rules by the draft boards, in which event the constitutional questions will presumably not be reached. Moreover, in any case where this does not occur, it is within the power of the government to move dismissal of that particular case voluntarily (as it has already done in three of the original 26 cases, including the two oldest ones -- one of them dating from the Korean War -- after the speedy trial claim was made), and this is a move which defense counsel cannot rightly resist without the unlikely consent of his client.

* * * * *

The foregoing explanation of the dynamics of this litigation is necessarily somewhat sketchy. If the Court permits, a fuller picture will be drawn in our brief on the merits. It is, however, sufficient to lay bare the basic issue, which (as

we have framed it in the first of the six Questions Presented, supra) is "[whether] the executive branch holds a jurisdictional monopoly over the treatment of [non-appearing defendants in draft violation prosecutions]".

For a very long time, Anglo-American courts were content with the sporting theory of justice in criminal cases. As demanded by that theory, they confined themselves to the task of resolving justly such issues as arose in the courtroom. More recently, a broader concern with the entire penal process has been manifested,with this Court taking the lead. More than sixty years ago, it evinced concern for justice in the investigation of crime by adopting the exclusionary rule of Weeks v. United States, 252 U.S. 383 (1914). Since that time the concern for justice throughout the system of penal law administration has surfaced in case after case, e.g., United States v. Wade, 388 U.S. 218 (1967) (identification line-ups); Procunier v. Martinez, 416 U.S. 396 (1974) (legal representation of prisoners); Wolf v. McDonnell, 418 U.S. 539 (1974) (same).

The onetime executive monopoly over jurisdiction to deal with suspected, accused, or convicted persons out of court has thus been broken in one area after another. The one remaining stronghold of that monopoly is the treatment of defendants who have not yet surrendered or been arrested. The callous reference to the indictment of such a person as "simply a statistic" reflects, on the part of the court of appeals, a determination to preserve what remains of the executive monopoly. On the part of the prosecutor, who coined that phrase in the trial court, it betokens that and something more.

The intensity of the government's concern, here evidenced by its application for interlocutory appellate review through the extraordinary remedies of mandamus and prohibition, is attributable to more than a generalized disinclination to lose a jurisdictional monopoly. There is also a political motive. It is common knowledge that the way in which the present administration handles the problem of "putting the war behind us" by clearing away the social wreckage with which that divisive war has bestrewn our society, is a matter of large political significance. The drastic reduction of the sentence of Lieutenant William L. Calley, Jr., has been one small aspect of the effort at reconciliation. The conditional amnesty program is another.

The conditional amnesty program was plainly threatened by our broadly based motion to dismiss in this case, which if granted and later approved by this Court would have provided the functional equivalent of unconditional amnesty to one of the three classes of persons to whom the offer of conditional amnesty was made -- indicted civilian defendants (the other two classes being convicted civilian defendants and military defendants). Even as early as last December, when the government petitioned the court of appeals for mandamus and prohibition, it was fairly clear that the program was a dismal failure -- indeed, a virtually complete failure for one of the three classes, indicted defendants, in which the present petitioners are included. The months since then, which have included a one-month extension of the program, have only served to make that failure indisputable. The failure has resulted not from lack of conciliatory purpose on the part of the executive branch, but because very few of the so-called "fugitives"

have been able to see why they, whose appraisal of the war as a national disaster turned out to be correct, should be required to "earn their way back" into our society by up to two years of prescribed civilian service, when the chief architect of that war in its last four years was granted a blanket pardon and a large cash allowance for readjustment to private life. Only the political need to retain exclusive control of the reconciliation effort can account for the government's fierce determination to keep the treatment of indicted draft case defendants within the exclusive control of the Department of Justice. The recent trial and conviction of former Attorney General John N. Mitchell and former Assistant Attorney General Robert C. Mardian, and the recent guilty plea of former Attorney General Richard Kleindienst, come as timely reminders of the age-old maxim that the executive branch is not the safest repository of absolute official power.

Of course we do not suggest that it is the proper business of courts to administer amnesty. We do maintain that it is the proper business of courts, and of the district courts in particular, to take care that their processes are not used oppressively. That is the main question in this case.

* * * * *

The second, third, and fourth of the Questions Presented (supra) are particularized statements of the first, and being subsumed under it are covered by the foregoing discussion. We now turn to the fifth and sixth questions, which can be dealt with much more briefly.

II. The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In its zeal to correct what it (erroneously) thought to be an excess or abuse of jurisdiction by the district court, the court of appeals neglected to observe the statutory limits on its own jurisdiction. Its intervention was invoked by the government under the All Writs Act, 28 U.S.C. §1651, which authorizes the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (Emphasis added) This statute provides the only authority for interlocutory appellate review in criminal cases other than the situations for which express provision is made in 18 U.S.C. §3731 (authorizing appeals by the government from dismissals of indictments except where the Double Jeopardy Clause of the Fifth Amendment forbids, and from certain pre-jeopardy evidentiary rulings, neither of which situations exists here). The question, therefore, is whether the court of appeals has any basis for finding that immediate correction of the supposed error of Judge Weinstein was necessary "in aid of", i.e., to protect its own jurisdiction.

On that theory mandamus, prohibition, and common law certiorari have been held permissible means of interlocutory appellate review in a few cases where failure to grant such review would or might prevent the appellate court from ever passing on the controversy.

That was true, for example, in De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945). There, this Court upheld interlocutory review of a district court's preliminary injunction, saying (at 217) that

> no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under §262 [of the Judicial Code, predecessor of the present 28 U.S.C. §1651] it can never be corrected if beyond the power of the court below. (Footnote omitted)

Here there is no such danger that the court of appeals will be ousted of jurisdiction, nor is irreparable injury threatened to any legitimate interest of the government. If the district court entertains motions to dismiss and grants them, the government can appeal under 18 U.S.C. § 3731, since there is no possibility of double jeopardy where the defendant has not appeared. If the district court denies such motions, the government will not have been harmed -- except for the political interest of the executive branch in maintaining its jurisdictional monopoly over defendants exiled through indictment for draft violation, an interest which we have already shown to be unworthy of protection by this Court.

As for the alleged confidential status of Selective Service files, the only persons who

might conceivably be harmed by the opening of such a file to the draft registrant's court-appointed attorney is the registrant, not the government; and the procedure ordered by Judge Weinstein would enable him to enter a protective order with reference to any material which in his opinion the registrant might find personally embarrassing. The government would also be free to apply for such a protective order, upon delivery of the file or a copy thereof to the district court, if its professed concern for the privacy of the registrant is genuine. It should be noted also that the court-appointed defense counsel would be bound by the canons of the profession not to make any use of the file in a manner detrimental to the interests of his client, the registrant.

Since it is plain that the court of appeals has grossly exceeded its own jurisdiction in its zeal to hold a tighter rein on the district courts than the jurisdictional statutes permit, corrective action by this Court is called for.

III. The amendments to the Freedom of Information Act which became effective on February 19, 1975, subsequent to the judgment of the court of appeals, have rendered the controversy partially moot; the judgment of the court of appeals should therefore be vacated with instructions to dismiss the petition for mandamus and prohibition, in so far as it relates to the continued withholding of access to Selective Service files.

Until February 19, 1975, only one thing prevented any member of the public -- a newspaper

reporter, for example, or a federal district judge, or the undersigned attorney in his capacity as a private citizen -- from obtaining access to Selective Service files under the Freedom of Information Act, 5 U.S.C. §552, subsection (a)(3) of which gave to the public full access to all "identifiable records" of federal agencies not exempted by subsection (b). That one thing was the broad exemption for "investigatory files" contained in subsection (b) (7).

Late in 1974, however, Congress enacted over President Ford's veto a number of amendments. Public Law 93-502, 93rd Cong., 2nd Sess., 88 Stat. 1561, Nov. 21, 1974, effective 90 days after enactment. Among other things, the exemption for "investigatory files" was very greatly circumscribed. It is no longer lawful for an agency to withhold such a file except under narrowly defined circumstances, none of which is present here. Even where disclosure of a file would result in unwarranted invasion of personal privacy, the agency can no longer withhold the entire file as was the practice under the previous law. All that can be done is to obtain an appropriate protective order excising the embarrassing or otherwise harmful material -- a procedure which, as noted above, is fully available under the orders of Judge Weinstein which the court of appeals has required him to vacate.

The net of it is that the controversy over the Selective Service files has proved to be a tempest in a teapot. There is no reason for the court of appeals to forbid Judge Weinstein

as a judge to obtain papers that he can now obtain as a citizen. We therefore suggest that the controversy over the files has become moot. In so far as the court of appeals order restricts Judge Weinstein in other respects, however, the case is still alive.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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